No. 12091

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LORAINE T. RICKENBURG, Executrix of the Estate of Edwin W. Rickenberg, Deceased,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF FOR PETITIONER.

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TABLE OF AUTHORITIES CITED

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Reply is herewith made to the arguments presented in the brief for the respondent in the order there made under I, II and III.

I.

Under Point I of the respondent's brief there is some discussion of the effect of the agreement of December 2, 1942, upon pre-1927 community property.

It is submitted that there is no issue before the Court involving pre-1927 community property. The respondent's determination was that the property was joint tenancy property. At the trial he proceeded on the theory that a division of community property occurred by transfers into common property [R. 62]. No issue was ever raised at the trial or in the pleadings that any of the property was

pre-1927 community property. The point should be passed because not properly raised.

Helvering v. Salvage (1936), 297 U. S. 106.

The next point made under Argument I of the respondent's brief is summarized on page 22 thereof and is:

> "That by the agreement converting the community property into property held by tenancy in common, the decedent divested himself of—*i. e.*, he 'transferred' within the meaning of Section 811 (c)—the very interest he had in the property which would have required its inclusion in his gross estate at his death under Section 811 (e) (2). Since such divestment at death satisfies the constitutional requirement that there be a transfer at death (see *Fernandez v. Wiener, supra*), it obviously also satisfies the requirements of Section 811 (c) in that regard.
>
> "We therefore submit that the decedent has made a transfer of an interest which he had in the property within the meaning of that section."

This argument is advanced in answer to petitioner's argument under Point II of her brief, pages 26 to 31, inclusive, that no interest in property was transferred by the decedent to his wife by the agreement of December 2, 1942. Respondent arrives at his conclusion after quoting from the opinion of *Fernandez v. Wiener* (1945), 326 U. S. 340, 355, appearing on pages 20 and 21 of his brief. It is submitted that the opinion in that case does not hold that a transfer of an interest in decedent Wiener's community held property to his surviving spouse occurred at his death. The Court held that it was the changes in the legal and economic relationships brought about by death which the legislative power could recognize and levy a tax

on the happening of the event which was their generating source.

In the quoted excerpts from the Supreme Court's opinion it is manifest that the Supreme Court very carefully instructed the lower courts and the bar that no interest in the community property was transferred to the surviving spouse upon the death of a decedent. The Supreme Court took full cognizance of and reaffirmed its earlier decisions that each spouse "owned" their respective shares of the community property. No interest in the property was transferred to the surviving spouse by virtue of death. The Supreme Court's opinion is replete with statements that all that occurs upon the death of a decedent owning community property is that the surviving spouse owns his or her property unrestricted and unfettered by any other powers and restrictions theretofore existing.

It is the cessation at death of the powers and restrictions over the property which furnish the appropriate occasions for the imposition of the tax. It was not the transfer of any interest in property that brought about the tax in the *Wiener* case.

Had the next paragraph of the Supreme Court's opinion in the *Wiener* case been quoted in respondent's brief the writers of the brief would have found a complete answer in the negative that a transfer of an interest in community property does not take effect in California at the death of one of the spouses holding their property as community property. The part of that paragraph which is pertinent is as follows:

> "The principles which sustain the present tax against due process objections are precisely those which sustained the California tax, measured by the entire value of community property in Moffitt v.

Kelly, *supra*. There the court recognized that the surviving wife took her share of the property on her husband's death, not as an heir, but as an owner of an interest, the right to which she acquired before the death and before the enactment of the taxing act. But the levy upon the entire value of the community was sustained, not as a tax upon property or the transfer of it, but as a tax upon the 'vesting of the wife's right of possession and enjoyment, arising upon the death of her husband' [218 U. S. 400, 31 S. Ct. 80], which the court deemed an appropriate subject of taxation, notwithstanding the contract, equal protection and due process clauses of the Constitution. * * *"

Similar statements contained in the opinion are as follows:

"* * * As the tax is upon the surrender of old incidents of property by the decedent and the acquisition of new by the survivor, it is appropriately measured by the value of the property to which these incidents attach. * * *

"We find no basis for the contention that the tax is arbitrary and capricious because it taxes transfers at death and also the shifting at death of particular incidents of property. * * *

"* * * Apart from the exemption, it is, as we have seen, the shifting at death of the incidents of the property, regardless of origin, which is the subject of the tax."

It is thus clear from the Supreme Court's own opinion that it drew a clear line of demarcation between a transfer of an interest in property subject to the federal estate tax and a cessation relinquishment or redistribution of powers

and restrictions over property resulting from the death of a decedent owning property held as community property which also was held to be subject to the federal estate tax.

The respondent has predicated its argument on this point on the holding of the Supreme Court in the case of *Fernandez v. Wiener, supra.* It has been shown that that decision holds that a transfer of the interest in property held as community property did not take place upon the death of the decedent Wiener, hence the basic premise of the Government's syllogism is erroneous. It follows *a fortiori* that its conclusion that a transfer of an interest in property within the meaning of Section 811 (c) is likewise erroneous.

The Government has failed to show what, if anything, constituted the interest in property which it claims decedent transferred by the agreement of December 2, 1942.

These vague incidents which attach peculiarly to community property cannot be severed from the property itself and hence could not be alone the subject of a transfer. Further, their very nature is such that they do not constitute under any theory of law an interest in property.

The power of management and control over community property enjoyed by the decedent was held by this Court not to be an interest in property in the case of *United States v. Goodyear* (C. C. A. 9, 1938), 99 F. 2d 523. It was there pointed out that such was analogous to an agency. And clearly a person may have control over property as an agent without having any interest in the property itself. Hence upon his death the cessation of that control or power over the property, or any such incident relative thereto, could not possibly, under any theory of law, constitute a transfer of an interest in property. Likewise,

a relinquishment or surrender of such incidents during life could not by the same token constitute a transfer of an interest in property.

The third point advanced by the brief of the respondent, to the effect that former Section 811 (d) (5) of the Internal Revenue Code involved herein should be also construed to be applicable to divisions of property held as community property between husband and wife, has been fully answered in Point III of petitioner's brief, pages 32 to 35, inclusive, and needs no further comment here.

II.

The argument contained in respondent's brief under Point II, that the transfer here in question was not a bona fide sale for an adequate and full consideration in money or money's worth within the meaning of Section 811 (c) of the Code, pages 25 to 36, inclusive, thereof, has been fully answered in petitioner's brief, briefs of the *amici curiae* and the dissenting opinion of Judge Hill to the majority opinion of The Tax Court [R. 36-40] and merits no further reply.

III.

Petitioner submits that all of the argument advanced in respondent's brief under Point III, pages 37 to 47, inclusive, thereof, have been fully met in her opening brief. However, a clarifying statement on the basic question involved of whether there was a transfer of an interest in property made by the decedent by the agreement of December 2, 1942, in contemplation of death within the meaning of Section 811 (c), is deemed appropriate.

The close parallel of the essential facts in the instant case to those in the case of *Allen v. Trust Co. of Georgia*

(1946), 326 U. S. 630, require the application of the principles decided in that case to this case, *i. e.*, a gift made to perfect ownership is not within the ban of Section 811 (c) of the Code even though it is done for the purpose of saving estate taxes.

A rearrangement of legal incidents of title which decedent and his surviving spouse had in their property so as to place the title in the form which the parties always intended to own their property, and to thus eliminate the surviving spouse's share of the property from inclusion in the gross estate of the decedent, is precisely analogous to the factual situation in the case of *Allen v. Trust Co. of Georgia, supra.* In that case the release of the power of amendment of the trusts was done to correct the trusts to perfect ownership even though the decedent Spalding, a lawyer himself, well knew and was advised that such act would serve to avoid the inclusion of the trusts in his gross estate and thus escape estate taxes thereon.

In the instant case the rearrangement of title was done to correct the earlier title holding to perfect ownership. The decedent Rickenberg was not even aware that any tax saving was being accomplished because he had been advised by tax counsel that changes in the estate tax law would not be effective upon such an agreement until January 1, 1943, and he acted on December 2, 1942. This makes the instant case even stronger.

Both petitioner and the Government are in accord that the quoted excerpt of the opinion from the case of *Allen v. Trust Co. of Georgia* (1946), 326 U. S. 630, 635, quoted at page 43 of respondent's brief, lays down the law controlling in the premises.

A simple statement of the facts will show why neither the instant case nor the case of *Allen v. Trust Co. of Georgia* is within the rule of law of Section 811 (c) of the Code laid down in that opinion. In that case the principle is stated:

> "Since the purpose of the contemplation of death provision was to reach substitutes for testamentary dispositions in order to prevent evasions of the tax (*United States v. Wells, supra,* pp. 116-117), the statute is satisfied, it is said, where for any reason the decedent becomes concerned about what will happen to his property at his death and as a result takes action to control or in some manner affect its devolution."

In the instant case the evidence establishes that decedent and his surviving spouse intended to own their property separately in equal shares. They thought they had accomplished such ownership by holding it in joint tenancy. The evidence is uncontroverted that the decedent became concerned with what was going to happen to the *property owned by his wife* at his death and not what was going to happen to *his property* at his death.

The decedent had no ownership in the property owned by his wife. This is true whether held in joint tenancy or as community, as has been fully substantiated by unquestioned authority in petitioner's opening brief and the briefs *amici curiae. (Fernandez v. Wiener, supra.)* The decedent made no effort whatsoever to dispose of his property prior to his death by the agreement of December 2, 1942. He merely executed the agreement to make certain that his wife would have title to her property in full legal, as well as equitable, ownership. As pointed out in the opening brief, had the decedent been concerned about

what would happen to *his property* at his death he would have made a gift of his property and would not have executed an agreement which merely changed the legal tenure but left him with the exact property which he had before.

Likewise in the *Trust Co. of Georgia* case the decedent Spalding was not concerned with what was going to happen to his property. He was concerned with what was going to happen to the property in the trusts which he had given away and had no ownership thereof. Hence the Court held that his release of the power to amend was not within the rule of law.

Therefore, by respondent's own argument applying the doctrine of the *Trust Co. of Georgia* case the agreement of December 2, 1942, did not constitute a transfer of an interest in property by the decedent within the meaning of Section 811 (c) of the Code.

Finally, without attempting to make any reply respondent seeks to brush off the argument advanced by petitioner in B, Point VII, of her opening brief, pages 67 to 73, inclusive, that Section 811 (i) of the Internal Revenue Code is controlling in the premises if the Court should hold that the agreement of December 2, 1942, constituted a transfer of an interest in property in contemplation of death within the meaning of Section 811 (c) of the Internal Revenue Code. Petitioner agrees that Section 811 (i) would have no relevancy if Section 811 (c) *is not* applicable, but as fully explained in petitioner's opening brief Section 811 (i) is applicable if the Court holds there were transfers within the meaning of Section 811 (c).

The argument set forth in respondent's brief is patently without logic.

The Government's case is simply that there were cross transfers of interests in property between the decedent and his surviving spouse by virtue of the agreement of December 2, 1942. The Government further contends that the transfer of decedent's interest in property, accomplished by the agreement of December 2, 1942, was made in contemplation of death within the meaning of Section 811 (c) of the Internal Revenue Code.

Petitioner contends, *inter alia,* that if a transfer of an interest of decedent's property was made by the agreement of December 2, 1942, that it was a bona fide sale for an adequate and full consideration in money and money's worth within the exception provided in Section 811 (c), and therefore the value of the interest was not includable in the gross estate of the decedent at his death.

The respondent in his brief replies and devotes the greater part of his brief to the argument that the decedent did not receive adequate and full consideration in money or money's worth for the interests in property so transferred by him and therefore the exception in Section 811 (c) is not applicable.

Since the Government's case is that there was an exchange of properties and the transfer by decedent was not a bona fide sale for an adequate and full consideration in money or money's worth, then it must have been a transfer for a consideration in money or money's worth within the meaning of Section 811 (i) of the Code. That section in final analysis is dispositive of the case in favor of the petitioner.

Conclusion.

The arguments advanced in the brief for respondent have failed to answer the points in the opening brief of petitioner which demonstrate that the decision of The Tax Court was erroneous. It therefore follows that the decision should be reversed and remanded for the reasons fully set forth in petitioner's briefs.

Respectfully submitted,

CHARLES J. MUNZ, JR.,
Attorney for Petitioner.